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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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No.

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above entitled case on June 22, 1972.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit which is reprinted in Appendix B is officially reported at 462 F. 2d 777. The opinion and order of the District Court for the Eastern District of New York which

is reprinted in Appendix C, is not officially reported but is unofficially reported at 66 LC para. 11,953. The District Court's supplemental decision and order which is reprinted in Appendix D is not reported. The District Court's findings of fact and conclusions of law which is reprinted in Appendix E is not officially reported. The District Court's amended findings of fact which is reprinted in Appendix F is not officially reported. The order of the Court of Appeals denying petition for rehearing which is reprinted in Appendix G is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1972. The order of the Court of Appeals denying a petition for rehearing was entered on July 24, 1972. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 USC Section 1254(1).

Questions Presented

1. Whether a federal court in a Section 102 proceeding, reviewing an expulsion of a member by a union, finding his expulsion in violation of Section 101(a)(2), and directing his restoration to membership, may also award the member's attorney reasonable counsel fees.

2. Whether a federal court in a Section 102 proceeding, in restoring an expelled member to membership, may award reasonable counsel fees when it is found that the member sustained no damages by reason of the expulsion; additionally found that the union in good faith believed it had the right to discipline the member for his conduct; further found no motivation of malice by the union in its discipline of the member and does not find that the member

by his conduct acted in good faith, but instead concludes the member's conduct was motivated in part for personal political ambitions.

3. Whether the proviso contained in Section 101(a)(2)[1] precludes a federal court from restoring to union membership a member expelled after union hearing for intentionally advocating and proposing action at a union meeting with knowledge of the foreseeable serious adverse consequences upon the union as an institution; particularly where such advocated action is found by the trial court to be such, as may be the cause and result of the union membership sustaining loss of employment opportunities and reducing both the union membership and its treasury.

Statutes Involved

The pertinent provisions of the Labor Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. Sec. 411 *et. seq.*—Sections 101(a)(2), 102, 29 U.S.C. Sec. 411(a)(2), 412, are set out in Appendix A, *infra*.

Statement of the Case

The defendant, Seafarers International Union of North America, Atlantic, Gulf, Lakes, Inland Water District (hereafter SIU), a union whose members are merchant seamen, since about 1940, has competed with the National Maritime Union (hereafter NMU), for membership among

[1] Section 101(a)(2) * * *: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

unlicensed merchant marine seamen. The SIU was formerly affiliated with the CIO, prior to the merger of the AFL-CIO (App. E, para. 11).* All employment opportunities for merchant seamen including the plaintiff Cole, arises from contracts between the union (SIU or NMU) and employers, with the union referring for employment on a seniority basis its members and registrants to man the vessels, from a union hiring hall operated by the union. By virtue of such contracts the employer makes contributions on account of men employed, to funds maintained with the union (SIU or NMU) to provide pension, welfare and vacation benefits for its members (App. F, para. 12(a)). At the time of the trial, plaintiff Cole had retired and was receiving a $250 monthly pension benefit from such fund (App. E, para. 27(z)). Throughout the years, including the times pertinent here, there has been extensive and intense rivalry between the SIU and the NMU for contracts with ship owners for jobs and referral of the same from their respective hiring halls (82a, 83a, 86a).** Such rivalry culminated in many jurisdictional disputes (90a, 148a)—similar to two fierce business competitors for the same market, which is rapidly decreasing, such as the American merchant marine whose market for carriage of American seaborne commerce in approximately a score of years has markedly decreased to only 6% of such carriage with consequential loss of employment opportunities for American seamen (90a, 148a).

Cole was fully knowledgable of the foregoing facts, the intricate workings and problems of the unions, to secure and maintain employment for their members viza their rival—the competitor union, and in fact had written articles upon the subject (83a, 87a, 88a). He further knew, that

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* App. refers to the Appendices attached.

** Numbers followed with letter "a" refer to the Appendix record certified by the Court of Appeals.

when his union the SIU, lost contracted vessels to the NMU, the SIU members lost job opportunities (86a); and jobs for vessels under contract, their preservation and securing of the same, was the foundation of the SIU, it's prime responsibility as an institution (129a). Cole further knew that the SIU's making of mutual assistance pacts with maritime unions representing officers aboard American merchant vessels, particularly the licensed engineer officers unions, were crucial to the SIU's prime purpose in preserving and securing contracted vessels—employment opportunities, in its intense rivalry and competition with the NMU (119a). Cole aknowledged that such mutual aid or assistance pacts were " * * * to protect our (SIU members) jobs" (124a).

Prior to the August, 1962 incident giving rise to Cole's expulsion from the SIU, his daughter in 1955, had been awarded a college scholarship by the Seafarers Welfare Plan (App. E, para. 8a-c). The following year the scholarship was revoked because of her failure to maintain a B average in accordance with the conditions of the grant (App. E, para. 8(d)). Shortly thereafter Cole commenced a campaign of grievances, complaints and criticisms against the union and its officers, the motivation therefor as explained by him, was his resentment over the revocation of his daughter's scholarship (App. E, para. 10). Such campaign, its scurrilous nature, its constant implementation including correspondence, publications and resolutions introduced at membership meetings, criticizing officers and opposing dues increases, etc., continued unabated for many years (73a-78a, 94a, 118). Such conduct evoked no disciplinary action by the union or its officers against Cole. On the contrary, Cole admittedly was advised, that if he felt the union or its officers had acted improperly he was required to make " * * * a full report to the authorities" (80a, 81a). In fact, notwithstanding Cole's above constant campaign against the union and its officers, no action was

ever taken against him therefor as the union considered such campaign his exercise of free speech—significantly as Cole admitted, "The union apprised me of my right of free speech" (77a).

Previously in 1957, Seas Shipping Corp. operated eight vessels under the name of Robin Line under contract with the SIU. The vessels were sold to Moore McCormack Lines whose vessels were subject to a contract with the NMU and the latter sought to have all the purchased vessels made subject to their collective bargaining agreement. This conduct brought about a jurisdictional dispute in which the licensed officers unions assisted the SIU pursuant to their mutual assistance pact. Ultimately the dispute was resolved by the NLRB with the SIU retaining under contract seven of such vessels and the NMU, the remaining one (App. F, para. 12(b)).

In early 1962, NMU instituted the same jurisdictional dispute—a raid against the SIU to place the seven remaining Robin Line vessels under its contract with Moore McCormack Lines. Such conduct precipitated picketing by the SIU and assistance from the licensed engineer officer unions. In addition, SIU filed unfair labor practice charges with the NLRB which eventually ruled in its favor. Simultaneously the SIU filed raiding charges against the NMU with the AFL-CIO which also ruled in favor of the SIU and the NMU's raid was repulsed (App. F, para. 12(c)).

In early 1962, in accordance with its then mutual assistance pact with the licensed officers union, District 2 MEBA, the SIU assisted in picketing activities of MEBA against Isbrandtsen Lines in support of a MEBA dispute with that company (App. E, para. 15(a); App. F, para. 13(b), 15(c), 15(d), 15(g)).

Cole admitted his knowledge of all of the foregoing facts prior to the August 1962 incident (88a-94a, 108a,

109a, 118a), which gave rise to the disciplinary charges filed against him resulting in his expulsion after notice to him and his participation in the union hearing.

At the August, 1962 membership meeting, Cole proposed, introduced and sought implementation of a resolution consisting of twelve preamble and four resolved clauses attacking the SIU's jurisdictional fights with the NMU and the mutual assistance pacts with the MEBA and support of its implementation (App. E, para. 16(e), para. 17). The resolution was defeated with only two members voting in favor, Cole and the member who seconded the resolution (App. E, para. 18(b)). Cole admitted that the purpose of his resolution, its object and end sought, for which he desired its implementation, was for the SIU and its membership not to contest the NMU in its raids against the SIU, notwithstanding no concomitant forebearing by the NMU, and further to terminate mutual assistance pacts with the licensed officers unions, the MEBA, notwithstanding his admission that the same was necessary to protect SIU membership jobs. Cole admitted that his conduct and end sought was a consequence of his philosophy, to wit, that as a member of the SIU he has two loyalties, one is to his union the SIU, the other to the union movement generally (192a). He further recognized and understood that his union, the SIU competes for jobs for its members, competes for a market against the NMU, just like a business competitor (130a). Further, he acknowledged that if it's advantageous to the SIU to obtain jobs that another union (NMU) has, or to protect SIU jobs against the NMU, it disadvantages the NMU. He further acknowledged that although raiding for jobs may result in benefit to the SIU and its membership it was contrary to his other loyalty to the union movement generally (129a). Consequently, consonant with his above philosophy and action sought for by his resolution, there should be no raiding by the SIU and participation in mu-

tual assistance pacts notwithstanding such activities preserve or secure jobs for the SIU, and notwithstanding that the NMU would continue to raid, as otherwise he felt, in the long run, SIU would suffer more in its reputation (131a). He further acknowledged that the SIU policies to preserve and secure jobs viza the NMU and maintain mutual assistance pacts with the officers unions, with SIU membership participation and support, was official union policy adopted by the SIU membership (142a, 143a).

On September 4, 1962, member DiGiorgio filed charges with the SIU against Cole alleging that Cole's conduct as exemplified by his proposed resolution (App. E, para. 16(e)) and sought for result at the August 6, 1962 membership meeting constituted a violation of SIU constitutional provisions.[2] The charges were based upon recitals in the Whereas clauses of the resolution (App. E, para. 20, 21). The September, 1962 membership meeting accepted the charges. A trial committee was elected to hear the charges and after notification Cole attended and participated in the hearing. The trial committee found Cole guilty as charged and recommended his expulsion and *inter*

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[2] SIU Constitution, Article XVI, Section 2, Paragraph (h):

"Deliberate and unauthorized interference, or deliberate or malicious vilification with regard to the execution of the duties of any office or job."

The charges filed against Cole, pursuant to such Article and Section read as follows:

a. Raiding a duly certified bargaining agent on contractual jurisdiction.

b. Moral arguments fabricated to justify SIU's interference in inter-union's beefs are both contradictory and phony.

c. Charges an Officer of this Union with the stealing of jobs from another union" (App. E, para. 19).

alia, made specific findings (162a, Defendant's Exhibit A, Exhibit T, 13 T 10 p. 2 and Exhibit 13 T 11 p. 2).[3]

The SIU membership thereafter accepted the trial committee's recommendations and Cole pursued the union constitutional appellate procedures. The findings of the trial committee were eventually affirmed (App. E, para. 24). Cole was advised that his expulsion would not however affect his right to and for employment through the union hiring hall (App. E, para. 25). Cole thereafter instituted this Section 102 proceeding.

The trial court concluded that Cole's conduct regarding his resolution, with his underlying philosophy and end sought, took place at a union meeting at which only union members were present, as such it was protected Section 101(a) activity. Furthermore, Section 101(a)(2)'s proviso, which permits labor organizations "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution", did not apply to Cole's conduct even though such conduct,

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[3] As to Charge A:

"This situation was especially important to the membership because the jobs and security of 234 union men employed at that time on the Robin ships, which the SIU was seeking to protect, hung in the balance as a result of the beef. It naturally follows that when the beef jeopardized the jobs of 234 men on the Robin ships and consequently their livelihoods, it also jeopardized the job opportunities and security of all SIU men, because of the nature of employment and job security in the maritime industry."

As to Charge B:

"The record is very clear. The MEBA had a legitimate dispute with American Export whose vessels it was picketing in order to protect its members' jobs. The SIU supported and assisted the MEBA with the approval of the membership. This was not a novel instance of support because SIU and MEBA have a record of mutual assistance over the past years in many important disputes affecting the security and welfare of the membership of either one or both of the two unions."

brought about by Cole's underlying union philosophy, "* * * may as the union contends, * * * result in a decrease in the number of union jobs available, would reduce both the union membership and the treasury" (App. C).

The trial court however found, that as a result of his expulsion Cole sustained no damages, was afforded full employment opportunities by the union and any loss of employment was by virtue of his own preferences (App. E, para. 27(a)-(y), 28, 29, 30, 31). Further found, was that the SIU and its officers acted in good faith, believed that they had a right to charge and discipline Cole for his actions at the August, 1962 meeting (App. C). The trial court additionally found no malice on behalf of any of the defendants against Cole (App. E, para. 32(a), (b), App. C). Finally, the trial court did not find that Cole acted in good faith. On the contrary it was found that Cole's conduct was motivated by his political ambitions for office (App. E, para. 34). The trial court dismissed the action against the individual defendants (App. E, para. 33, and Conclusions of Law) and by mandatory injunction against the union directed it restore Cole to membership (App. E, Conclusions, para. 2).

With respect to Cole's request for attorney fees, the trial court concluded that although Section 102 was silent as to authority to award counsel fees to successful union members in Section 102 actions, it was persuaded by *Gartner* v. *Soloner*, 384 F.2d 348 (3 Cir. 1967), cert. den. 390 U.S. 1040, that such authority is present.

The trial court awarded Cole's counsel reasonable attorney's fees, to wit, $5,500 (App. D).

The Court of Appeals affirmed. In accord with the trial court, the Court of Appeals held that Cole's activity was protected under Section 101(a), having been engaged in and made at a union meeting and concerning union affairs. As to the issue of federal court's authority to

award counsel fees, the Court of Appeals, in accord with the Third Circuit's *Gartner* holding, *supra*, determined that Section 102's provisions authorizing district courts to grant "such relief (including injunctions) as may be appropriate", constitutes the necessary authority for federal courts to make an award of reasonable counsel fees in appropriate cases—finding the instant case such an appropriate instance.

Neither the trial court or the court of appeals, elaborated upon the concept of when an award is appropriate. No consideration was given to the specific court findings of defendant's good faith, absence of malice and failure to find plaintiff's good faith.

Reasons for Granting the Writ

I.

The court below in affirming an award of counsel fees in a successful Section 102 proceeding has exceeded its authority. By the affirmance, such court has perpetuated a conflict between circuit courts of appeal concerning the scope of remedy intended by Congress in Section 102 proceedings.

This case is one in which an unresolved conflict is perpetuated among Circuit Courts of Appeals as to whether or not Congress intended to and authorized federal courts to award reasonable counsel fees to union members, successful in Section 102 proceedings. Further, it is one in which standards applied by the trial and affirming court and other Circuit Courts, to determine the congressional intent embodied in Section 102 are contrary to standards applied by another Circuit Court and this Court. More important this case presents the fundamental issue as to the relationship of the federal courts to union disciplinary proceedings.

Pointedly stated, it presents the issue of whether federal courts, without express statutory authority, may nevertheless impose upon union treasuries extraordinary monetary awards, counsel fees, as a consequence of administration of disciplinary proceedings by unions in pursuit of the Congressional mandate to foster union self government. Such judicial imposition of substantial money assessments[4] will of necessity chill if not frustrate, the internal union self regulation which Congress was careful to preserve and further, weaken unions in their role as collective bargaining agents, which Congress sought to prevent in eacting the Labor Management Reporting and Disclosure Act[5] (73 Stat. 523, 29 USC Sec. 411 *et seq.*).

The impact of the imposition of counsel fee awards upon unions, is most substantial. It's consequences engulfs millions of union members throughout the country, their union treasuries, and thousands of labor organizations engaged in the day to day administration of union self government. Similarly, it is patent that such impact has adverse effects upon the legislative object of stability in collective bargaining relations. An integral part of such stability mandates a viable and meaningful union fulfilling its role in the collective bargaining process, not one beset with irresponsibility occasioned by untoward conduct of its constituency, left unredressed by virtue of the fear of substantial impact upon their treasury for extraordinary damage awards which may arise, as distinguished from compensatory damages for members loss of employment, brought about by virtue of an imperfection in the administration of self government. For as here, the union sought

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[4] It is to be noted that premising an award of counsel fees on Section 102's "such relief (including injunctions) as may be appropriate, may be equally applicable to awards for punitive and exemplary damages."

[5] *NLRB* v. *Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 194; *Hodgson* v. *Local 6799 United Steelworkers of America*, 403 U.S. 333, 338.

to and did impose such discipline in a good faith effort to maintain its viability so as to fulfill its role as a meaningful collective bargaining agent for its seamen members, without impinging upon Cole's right to and for employment.[6] Yet, its treasury is now the source for payment of a substantial sum for counsel fees for Cole, who sustained no compensatory damages.

This Court, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967) addressed itself to the issue of the authority of federal courts to make reasonable counsel fee awards to successful litigants, and after reviewing the history of counsel fee awards in the United States, concluded, "The rule here has long been that attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor". Id. at 717. As expressed by this Court, although there were exceptions to the general rule they, "were not developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies". *Id.* at 719. This Court then concluded (at 721):

> "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. Philip v. Nock, 17 Wall. 460, 21 L. Ed. 679 (1873); Teese v. Huntingdon, 23 How. 2, 16 L. Ed. 479 (1860); cf. Day v. Woodworth, 13 How. 363, 14 L. Ed. 181 (1852). Congress has over-

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[6] As found by the trial court, *supra*, Cole's employment rights after his expulsion, remained inviolate and he sustained no damages concerning such rights (21a, 22a).

The trial court further found, *supra*, that the union and its officers in charging and disciplining member Cole, in good faith, believed they had a right to charge and discipline him and they acted without malice (33a), and did not find that Cole acted in good faith, but on the contrary, found that he was motivated by political ambitions for office.

Significantly, the affirming Court of Appeals in its opinion makes no mention of the foregoing crucial findings.

> turned the specific consequences of Philip and Teese by expressly allowing recovery of attorney's fees in patent cases and has selectively provided a similar remedy in connection with various other statutory causes of action. But several attempts to introduce such a provision into the Lanham Act have failed of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context."

The Act at bar is without question a most complex and intricate statute whose scope regulates an extensive range of internal union affairs. Its specific remedies for the violation of the specific conduct regulated, are tailored and fashioned to the specifically created substantive rights and obligations. Title I, Sections 101(a)(1) through (5) covers rights and obligations affecting union members as to equal rights, freedom of speech and assembly, dues, initiation fees and assessments, protection of the right to sue and safeguards against improper disciplinary action. As to other Title I rights, its Section 103 provides for a member's retention of existing state and federal rights; Section 104, the right to copies of collective bargaining agreements and Section 105, the right to be informed by his union as to the provisions of the Act. Each of these varied, intricate and extensive rights are private rights enforceable by the member in a civil action in a federal district court pursuant to Section 102 for, "such relief (including injunctions) as may be appropriate". In addition to the aforesaid Section 102 remedies, a further remedy is provided for the violation of a member's right enunciated in Section 104, *supra*. Such remedy is enforceable by the Secretary of Labor pursuant to the Act's Section 210. As distinguished from other Titles and Sections of the Act, which specifically provide for award of counsel fees

as part of the remedy, no such provision is made applicable to Title I rights.

The Act's Title II, Sections 201-210, further demonstrates a most detailed and comprehensive scheme for the making and filing of reports by unions, their officers and employers, together with such reports being available for public information and the requirement of those obligated to file reports, to retain all records and documents in support. Title II's Section 201(c) requires unions to permit its members, for just cause, to examine all records in support of reports filed with the Secretary. In the enforcement of Title II provisions, in addition to criminal sanctions, the Secretary pursuant to Section 210, may institute a civil action, "for such relief (including injunctions) as may be appropriate". Such provision is identical to that contained in Section 102. Most significant, in addition to the foregoing remedies, a member has a private right of enforcement against his union for a violation of his rights provided for in Section 201(c), *supra*, similar to the private right of enforcement for violation of his Title I rights. However, with respect to proceedings to enforce his Section 201(c) right, Congress expressly provided that the federal court may in such proceeding, in its discretion, "in addition to any judgment awarded to the plaintiff * * *, allow a reasonable attorney's fee to be paid by the defendant and costs of the action". No such similar provision is contained in Title I's enforcement procedure, to wit, Section 102.

The Act's Title III Sections provide for labor organizations to file reports with the Secretary where a trusteeship has been imposed upon a subordinate body (Section 301); provides the purpose for which a trusteeship may be established (Section 302); and defines what conduct is unlawful as relating to a union under trusteeship (Section 303). Section 304 provides the remedy for the violation of Title III provisions, both by the Secretary and by a private suit

by a member. As to the remedy applicable to both—the language is identical to that of Sections 102 and 210, *supra*, to wit, "for such relief (including injunctions) as may be appropriate".

The Act's Title IV prescribes precise and extensive rules and regulations for the conduct of union elections with the exclusive right of the Secretary to investigate election complaints and institute proceedings, if warranted, in federal courts to set aside elections and to conduct reruns under his supervision. Notwithstanding the same, Section 609 provides that if a member is disciplined for exercising any rights provided for him in Title IV as well as pursuant to any other Title, the member may institute proceedings and the provisions of Section 102 shall be applicable. Again no expressed authority to federal courts to award reasonable attorney's fees.

The Act's Title V Section 501(a) and (b), establishes fiduciary responsibilities for officers of labor organizations. For violation of that obligation a member is provided with the right under Section 501(b) to institute proceedings "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization". Further provision is expressly made for the allowance of attorney's fees. Title V contains other provisions not necessarily relevant but which again demonstrate the meticulous scheme Congress established as to the boundaries of its regulation and expressed relief for violation of such regulations.

Similarly, as to such Congressional detail and meticulous scheme, are the provisions of Title VI, with investigatory powers provided the Secretary; defining conduct deemed criminal and its Sections 609 enforcement authority incorporating the specific authority contained in Section 102, *supra*, where a member is disciplined for exercising, "any right to which he is entitled under the provisions of this Act."

The foregoing legislative scheme utilized by Congress makes clear that where Congress determined to provide authority for the recovery of attorney's fees, it had no hesitation in so expressly stating, as demonstrated by the Act's Sections 201(c) and 501(b) *supra.*

The legislative history, although relatively sparse on the issue of "relief (including injunctions) as may be appropriate" under Section 102, nevertheless, such history as is available demonstrates Congressional intent not to authorize attorney's fees under Section 102 provisions.

In the judicial search of legislative history, in the endeavor to gleam or determine the legislative intent, the primary weight should always be given to the views expressed by the sponsors of the bill. *National Woodwork Manufacturing Ass'n.* v. *N.L.R.B.*, 386 U.S. 612 (1967). It is unquestioned that the prime sponsors of the Act in the House, were Congressmen Landrum and Griffin. In fact, the Act is referred to as the Landrum-Griffin Act. Congressman Griffin, in referring to the Act's Section 609, which provides that Section 102's remedies shall be applicable—incorporates them, stated:

> "(c) Section 607 of the Senate-passed bill which provided criminal enforcement of rights guaranteed under the Act was stricken by the House committee. The substitute—in sections 609 and 610—restores the sense of the Senate provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence."

Leg. Hist. Vol. II, p. 1519, col. 3.[7]

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[7] The legislative history of the Labor Management Reporting & Disclosure Act, is reproduced in a two volume work published by the National Labor Relations Board and printed by the Government Printing Office. The notation "Leg. Hist." will indicate references to this work.

Thereafter Congressman Griffin in the Congressional debate, turning to a detailed analysis of the Act, stated:

> "Section 609 (denial of rights through discipline): The Senate-passed bill (S. 1555) contained a criminal enforcement provision (sec. 607) which was stricken out by the House committee. (Paragraph (a) of that section 607 would have made it a crime for any labor organization, or its agents, to fine suspend, expel, or otherwise discipline a member for exercising rights guaranteed by the act). The substitute bill provides that denial of such rights through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." Leg. Hist. Vol. II p. 1522-col. 1.

The conduct which the Act's sponsors prohibited was in their judment comparable to unfair labor practices under the Taft-Hartley Act (29 USC Sec. 141 *et seq.*). By tracking the Act's prohibited conduct (other than those specifically made criminal) with unfair labor practices, by equating both, the Act's sponsors were setting forth the Congressional scheme as to the prohibited conduct and the comparable appropriate remedies. Certainly there cannot be imputed to the Act's sponsors an ignorance of the remedial provisions contained in the Taft-Hartley Act. Equally, in the light of the comparable conduct sought to be prohibited, unfair labor practices and rights of members established by the Act, there should not be found, absent expressed language to the contrary, a Congressional intent to prescribe substantially different remedies. On the contrary, the converse would be impelled—the same remedies. Taft-Hartley's remedial provisions provides that the NLRB:

> "* * * shall issue an order requiring such person to cease and desist from such unfair labor practice, and

> to take affirmative action including reinstatement of employees with or without back pay, as will effecuate the policies of this Act:" (Section 10(c))

Such NLRB remedy encompasses injunctive relief as well as monetary damages to the employee to the extent of his lost wages and does not permit of other monetary remedies. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940). Conduct comparable to unfair labor practices which the Act's sponsors sought to prohibit, implicitly carries with it the Congressional intent to apply comparable remedies absent expressed language to the contrary such as in Sections 201(c) and 501(b). And discipline by a union of a member, allegedly in violation of the exercise of Section 101(a)(2) rights of expression and conduct in support thereof is most comparable, if not the counterpart of employer discipline of an employee for exercise of his Section 7 rights provided in the Taft-Hartley Act and an unfair labor practice under Section 8(a)(3) of that Act.

The foregoing congressional intent to apply comparable remedies to comparable conduct which Congress sought to prohibit, becomes most manifest when further examination is made of Congressional remarks.

Senator Goldwater, an advocate of a bill more stringent than that eventually passed and now constituting the Act, directed his remarks as to what he considered weaknesses in the Act. Zeroing in on the remedy provided for violation of a member's rights guaranteed by the Act, he stated:

> "Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Morever, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-

and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for non payment (which he may do in the State as well as the Federal courts) and to recover attorney's fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf. "Leg. Hist. Vol. II p. 1281—col. 1.

Similar to Senator Goldwater's remarks is the House Minority Report on the Act. H.R. Rep. No. 741, 86th Cong. 1st Sess. (1959), U. S. Code Cong. & Ad. News 1959, p. 2424:

> "One of the most serious inadequacies of the Senate bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under the bill the individual member must shoulder the burden of litigation costs himself. The union officer (sic), on the other hand, have the entire resources of the union at their disposal. This impractical enforcement method is weakened still further in the commttee bill."

The Act at bar originated with the reporting of the Kennedy-Ervin Bill to the Senate by the Committee on Labor and Public Welfare, in April, 1959. Leg. Hist. Vol. II, p. 1019 cols. 2, 3. Such bill however, did not contain provisions, euphemistically thereafter characterized as bill of rights. A few days thereafter Senator McClellan proposed an amendment to the Kennedy-Ervin bill, which provided for member's bill of rights. The enforcement Section of such amendment provided:

> "Sec. 102. Any officer or agent of any such labor organization who, through use or abuse of authority, or through failure to discharge the duties of his of-

fice, or otherwise, wilfully interferes with or prevents, or attempts to interfere with or prevent, the exercise by any member of a right to which such member is entitled under the provisions of section 101 shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Sec. 103. The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title. Any such action against a labor organization may be brought in the United States District Court for the District of Columbia or in the district court or other court of the United States where the violation occurred or is about to occur." Leg. Hist. Vol. II, 1102, cols. 2, 3.

It is most significant to note that Section 103 of the McClellan amendment was the same language contained in the enforcement provisions provided for under Title II, Section 210 and Title III, Section 304(a).

Thereafter, serious concern was expressed as to the enforcement provisions of Section 102 in that bureaucratic chaos might result if the Secretary was required to initiate and process all complaints on behalf of union members. Leg. Hist. Vol. II, pp. 1111-1114. To dispel such fears, Senator Kuchel offered an amendment removing the Secretary of Labor as the sole person to seek relief in federal courts and instead gave that right directly to the aggrieved union member. The Kuchel amendment became the version ultimately adopted by the Senate, and states:

"Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate. Any such action against a labor organization shall be brought in the United States district court for the district where

> the alleged violation occurred, or where the headquarters of such labor organization is located." Leg. Hist., Vol. II, p. 1221.

The only substantial alteration of the Kuchel amendment was the subsequent parenthetical insertion of the words "including injunctions", to insure that at least an injunction would be considered appropriate relief under the Act. *Gartner* v. *Soloner, supra,* at p. 350.

It is most apparent from the foregoing that at no time did Congress intend reasonable counsel fees awards to be authorized pursuant to Section 102. The legislative history aforesaid contains no authority for any conclusion which would authorize the award of attorney's fees. It is further clear that only the Secretary of Labor was contemplated to be the sole authority authorized to enforce the provisions and certainly it cannot be maintained or inferred that Congress intended the Secretary to be awarded attorney's fees, for, as noted, the Kuchel amendment was solely to remove the fears of bureaucratic chaos and nothing else. When Congress intends to allow recovery of attorney's fees in statutory actions, it has no difficulty in so expressly stating, as witness, *Fleischmann, supra,* at 721, fn. 17.

The foregoing concept is equally present in the Act at bar. For when Congress determined in the Act to authorize reasonable attorney's fees, it so specifically stated, as in the Act's Section 201(c) and 501(b). To imply a Congressional intent that the federal courts may award attorney's fees in Section 102 actions, absent specific authority in the Act, where other Sections of the same Act contain such specific authority, *supra,* would constitute an aborting of Congressional intent, and substitute a judicial judgment for a congressional judgment. Such conduct would expressly override accepted judicial doctrine utilized for finding the manifestations of Congressional intent, set forth so clearly in *Fleischmann* at 721, fn. 17, *supra.*

More than thirteen years has transpired since the Act's enactment. During that period District Courts and Circuit Courts of Appeals who passed upon the scope of Sections 102 and 609, are in substantial conflict as to whether such Sections authorize federal courts to award attorney's fees to successful litigant union members. The following cases and discussion demonstrates the serious conflict.

Courts which have determined that federal courts have no congressional authority to award attorney's fees in successful Section 102 and 609 proceedings.

In *McCraw* v. *United Association of Journeymen & Apprentices of the Plumbing, etc.*, 216 F. Supp. 655, 664, the District Court concluded that in a successful Section 102 proceeding, no authority is present for allowance of attorney's fees, concluding that, "The Legislative history of this statute * * * reflects that the bill was so interpreted at the time of its enactment", citing Senator Goldwater's remarks, *supra.*

Upon an appeal by the member from such decision denying attorney's fees, the Sixth Circuit Court of Appeals in *McCraw* v. *United Association of Journeymen & Apprentices of the Plumbing etc.*, 341 F. 2d 705, 710, (1965), affirmed the District Court's holding for the same reasons expressed by the lower court.

In *Gartner* v. *Saloner, supra,* the Third Circuit in a split decision, reversed the District Court's conclusion that Section 102 does not authorize federal courts to award attorney's fees to successful litigants. The majority decision in *Gartner* is discussed *infra.* The minority would have affirmed the District Court.

The minority's decision is premised upon this Court's expression in *Fleischmann, supra,* that ordinarily counsel fees are not recoverable as damages. In support, the minority cited the legislative history *supra,* of the Congres-

sional developments resulting in the enactment of the Act's Section 102. Commencing with the original Kennedy-Ervin bill in the Senate, and the amendment to such bill by Senator McClellan, it pointed out that in the McClellan amendment the sole authority to institute Section 102 proceedings was the Secretary of Labor. That the Kuchel amendment to the McClellan bill was adopted solely because of the concern that bureaucratic chaos might result if the Secretary of Labor was required to initiate all complaints. The minority concluded that the Secretary obviously would not be entitled to counsel fees and thus it would appear, that counsel fees were never intended by Congress to be authorized by Section 102's enforcement provision, to wit, "* * * such relief * * * as may be appropriate." Further in support of its conclusion the minority stated * * *, "indeed, all Congressional comment contained in the Legislative history is to the contrary", citing Senator Goldwater's remarks and the Minority House Report, *supra.*

District Courts who have concluded that there is no congressional authority for an award of counsel fees in Section 102 proceedings are *Vars* v. *International Brotherhood of Boilermakers,* 215 F. Supp. 943 (D.C. Conn. 1963), affirmed on that part of the judgment that restored membership rights, 320 F. 2d 576 (2 Cir. 1963), no appeal was perfected on denial of award of counsel fees as not being authorized; *Cole* v. *Hall,* 35 FRD 4 (D.C. E.D.N.Y. 1964), same case as at bar, constituting a court holding on a successful pre trial motion to dismiss the cause of action for attorney's fees, that same was not authorized,[9] *Bailey* v. *Netter* 266 F. Supp. 165 (D.C. E.D.La. 1967); *Jacques* v. *Local 1418 ILA, et al.,* 246 F. Supp. 857 (D.C. E.D. La. 1965); *Magelson* v. *Local Union No. 518,* 240 F. Supp. 259

[9] Upon trial of the case at bar, the court advised that after conversation with brother Judge and his consent, the court would reinstitute plaintiff's claim for an attorney's fee award and determine the same.

(W.D. Mo. 1965): *Leonard* v. *MIT Employees*, 225 F. Supp. 937 (D.C. Mass. 1964); and *Yablonski* v. *United Mine Workers*, 314 F. Supp. 616 (D.C., D.C. 1970).

In *Yablonksi*, *supra*, the member's action was commenced pursuant to the Act's Section 609 which incorporates Section 102's relief provisions, alleging *inter alia*, a violation of Title IV rights, constituting a denial of right to the use of mailing lists and union journal in a forthcoming union election, as well as for relief by virtue of alleged dismissal from union employment because of the exercise of rights protected by the Act. After review of the legislative history, *supra*, the District Court concluded that Congress did not authorize an award of counsel fees. Also cited as authority was *Fleischmann*, *supra*.

The *Yablonski* court further discussed *Mills* v. *Electric Auto Lite Co.*, 396 U.S. 375 (1970), as an exception to the *Fleischmann* rule, *supra*, holding the *Mills* determination however, not applicable to the Act at bar. The court demonstrated that *Mills* involved an "implied private right" as distinguished from the Act's specifically created Congressional rights, and the need to fashion relief for such implied private right, a task which Congress patently did not undertake to perform. Furthermore, the implied right in *Mills* was akin to the Act's Section 501(a) and (b) provisions—both actions of a derivitive nature, and specifically noted that under Section 501(b) Congress expressly provided for counsel fee award. It was further demonstrated that the Act at bar was comparable to the Lanham Act, present in *Fleischmann*, *supra*, in that each demonstrated a meticulous scheme of regulation with specific remedies tailored to each of the created rights and where Congress concluded that counsel fee awards were appropriate to a particular created right, it so expressly stated. Such Congressional careful, meticulous drafting and scheme was not present in *Mills*, where the right established was

an implied private right. Pinpointing the issue crucial to the determination, the court stated:

> "As noted, supra, in only two instances does the LMRDA provide for the award of attorney's fees, i.e., in actions arising under §§ 201 (c) and 501 (a), and none of the cases here under discussion can be said to clearly fall within the scope of these two specific sections. In the language of *Fleischmann*, those sections "mark the boundaries of the power to award monetary relief" in cases arising under the LMRDA. Congress had the opportunity to extend this remedy beyond the two specific provisions but chose not to do so. To now award fees in these cases the Court would have to ignore the clear Congressional intent and carve out an implied remedy that attorney's fees are available for a violation of any section of LMRDA. The Court is not at this time inclined to so rule." Id. at 619.

Courts which have determined that federal courts have congressional authority to award attorney's fees in successful Section 102 and 609 proceedings.

The lead case cited by other courts, which have concluded that Congress authorized attorney fees awards in Sections 102 and 609 proceedings is the Third Circuit's *Gartner* holding, *supra.*

The *Gartner* majority at the outset recognized that the only circuit court which had to then passed upon the instant issue of attorney's fees awards in Section 102 proceedings, was the Sixth Circuit in *McCraw, supra.* With respect to the same the *Gartner* majority stated:

> "On appeal the Sixth Court affirmed the District Judge's finding" * * * that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act.* * *." *McCraw* v. *United Ass'n of Journey, & App. of Plumbing,* 341 F. 2d 705, 710 (6 Cir. 1965). Id. 350.

The Court majority rejected the remarks contained in the Minority House Report, *supra,* as well as those of Senator Goldwater, *supra,* noting that, neither of those communications were voiced as part of the floor debate on the Act in either the House or Senate, Id. 351, footnoting their (the court's) comments. The majority consequently characterised such report and remarks not appropriately legislative history to discern the Congressional intent. We respectfully submit that such conclusion is erroneous and constitutes an unfounded precept. The majority then cited the comments of Congressmen Elliott and O'Hara.[10] Concluding, in accordance with *National Woodwork, supra,* "* * * primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102." It. 353.

However, as the majority notes, the Elliott bill was rejected and the bill eventually passed by the House was the Landrum-Griffin bill. The majority's error is in its failure to observe its own rule, to wit, to look to the comments of the sponsors of the Landrum-Griffin bill as representing the true spirit of Section 102. For as we have demonstrated, *supra,* Representative Griffin's views furnish no basis to conclude that there is Congressional authority for award of attorney's fees. On the contrary, the conduct sought remedied was comparable to Taft-Hartley unfair labor practices and consequently intent for comparable remedies. Similarly, as to the statements of Senator McClellan as representing the true spirit of Section 102. As the *Gartner* minority *supra* expressed, in

[10] The majority's citation of Representative O'Hara's comments at p. 353, failed to state that such were made in support of the rejected Elliott bill. Leg. Hist. Vol. II 1633, col. 1, and made at a time that the Landrum-Griffin bill was before the House: See Rep. Griffin statements, Leg. Hist. Vol. II, pp. 1519, 1522. Id. 352, 353.

accord with the majority, and as our discussion of Senator McClellan's amendment equally expressed, the Senator's amendment constituted no rational basis to conclude that attorney fees were authorized. On the contrary, it's relief provisions, limited to their exercise by the Secretary of Labor, compels the conclusion that attorney's fees were never intended or authorized. To conclude otherwise, would mandate that Congress authorized the courts to award attorney's fees to the Secretary of Labor, a result most far fetched, if not inconceivable. Similarly, the majority's reliance upon *Johnson* v. *Nelson,* 325 F. 2d 648 (8th Cir. 1963), is inappropriate. *Johnson* was a proceeding pursuant to the Act's Section 501(a) and (b) where Congress expressly authorized the award of counsel fees. The *Johnson* court's comments as to Section 102, not relative or necessary to their determination, sans exhaustive study, review and analysis of the legislative history, and made prior to the *Fleischmann* holding, *supra,* is at the best purely gratuitous dicta.

The *Gartner* majority, apparently in an endeavor to explain away Congress' failure to expressly provide authority for attorney fee awards, held that it was because of:

> "* * * in the heavy presure atmosphere attending the creation of the Labor Management bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union member "appropriate relief". That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill.

> of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees." Id. 355.

It is most respectfully submitted that the foregoing does not demonstrate a search for legislative intent. It is, we respectfully submit, an interpretation premised upon conjecture, not a judicial search for the requisite intent of Congress. The court's opinion first creates a "heavy pressure atmosphere" without explication upon such phrase. It then attributes to Congress "a manifest reluctance to specifically detail an individual's right to reimbursement for counsel fees* * *." If further attributes to Congress the utilization of the term "appropriate relief", as the authority for attorney's fees award, in order to "avoid spotlighting". Why such heavy pressure atmosphere, reluctance and spotlight avoidance did not preclude Congress from expressly authorizing attorney fee awards in other Section as demonstrated *supra,* is never explained. Most significant is Section 609. It provides that Section 102's enforcement provisions shall be applicable to it in enforcement proceedings to remedy a violation of a member's right under any provisions of the Act. It is not limited to the bill of rights legislation. Yet, by the court's holding, premised upon "heavy pressure atmosphere", attorney fee awards by virtue of Section 609 are applicable to remedying all rights, not solely those set forth in the bill of rights, concerning which, the court concludes such, "heavy pressure atmosphere" was only applicable.

We again most respectfully submit, that the acceptance of such criteria, the utilization of such nebulous, ephemeral and subjective standards for judicially determining Congressional intent, would render the task impossible of objective performance. It would be contrary to the criteria and long established doctrine set forth in *Fleischmann,*

supra. Such conduct, if authorized, would judicially usurp functions of Congress.

In addition to the Third Circuit's holding in *Gartner*, the Fifth Circuit has recently also passed upon the same issue. In *Burch* v. *International Assn. of Machinists*, 454, F. 2d 1170 (1972), the Fifth Circuit, in a per curiam decision held:

> "The judgment of the district court, 337 F. Supp. 303 is affirmed. See Local Rule 21. That court's finding that the termination of Burch's membership was arbitrary and discriminatory is not clearly erroneous. Moreover, the district court properly construed the "appropriate relief" provision of the Landrum-Griffin Act to permit the award of attorney's fees in this case. 29 U.S.C. § 412; *Gartner* v. *Soloner*, 3 Cir. 1967, 384 F. 2d 348, cert. den'd 390 U.S. 1040, 88 S.Ct. 1633, 20 L. Ed. 2d 302."

The Second Circuit in the case at bar, affirmed in part upon the *Gartner* authority, *supra*,[11] perpetuating the conflict among and between the courts. As to the application of the *Fleischmann* holding, and the fact that Congress expressly authorized attorney fee awards in some Sections of the Act and not others, the court characterized it as a "non sequitur here", stating:

> "These sections have to do with narrowly defined remedies such as the examination of books and records and an accounting. Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 i.e. 'such relief as may be appropriate'." Id. 781.

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[11] The court concluded that the Sixth Circuit's *McCraw* holding is not contrary to *Gartner*, although oft so cited, as an examination of that case "reflects that the court * * * did not specifically pass on Section 102, but instead considered Section 431(c) Id. 780. We respectfully submit that the court is in error. *Gartner, supra,* expressly states otherwise and so does a close reading of *McCraw.*

Sections 101(a)(3) and 401(c), to cite a few, equally have to do with narrowly defined remedies such as not having dues and assessments increased without a secret ballot; the right to inspect membership lists and for campaign literature to be mailed at a member's expense. Yet Congress did not provide for attorney fee awards there as they did for remedies under Section 201(c) and 501(b). No explanation is proferred by the Second Circuit of Congress' different remedy treatment for these same narrowly defined remedies.

Interpreting the Act, in the manner performed by the Second Circuit, *supra*,[12] is contrary to the Act's legislative history and to the historic doctrine here in the United States relative to award of counsel fees in statutory causes of action, expressed in *Fleischmann, supra.*

Some of the District Court holdings in accord with the *Gartner* majority are *Sands* v. *Abelli,* 290 F. Supp. 677 (SDNY 1968) and *Robins* v. *Schonfeld,* 326 F. Supp. 525 (SDNY 1971).

It is now more than 13 years since the Landrum-Griffin Act has been in effect. As demonstrated by the discussion of the cases, *supra,* both District Courts and Circuit Courts of Appeals who have passed upon the scope of Section 102

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[12] The court notes that plaintiff's counsel was "largely on a pro bono publico basis". Id. 780. The record demonstrates, on counsel's own admission, that counsel was assigned Civil Liberties Union counsel whose services were gratis (4a-6a). As to the Court's comments that Cole's preliminary injunctive relief required six months "largely because of the dilatory action of the union and its officers", Id. 780—there is no support in the record, let alone evidence to justify such statements.

Significantly, and most unusual, the court fails to discuss, take notice or even mention the trial court's findings, *supra*, that the union and its officers acted in good faith, without malice and the court's failure to find that Cole's conduct was not in good faith, but on the contrary, found his conduct motivated in part by political ambitions for office.

and 609 are in substantial conflict as to whether such Sections authorize federal courts to award attorney fees to successful union member litigants.

In the interest of sound administration of the Act, decisional uniformity, the millions of trade union citizens, their thousands of labor organizations and finally in the interest of national labor policy which Congress expressed in the Act, the foregoing issue with its attendant conflicts is now ripe for this Court's resolution.

II.

Counsel fees are not awardable in suits against unions under Section 102 for violation of members Section 101(a) rights where the union acts in good faith or without malice. Nor are such fees awardable unless the suing member is found to have acted in good faith.

The question as to whether counsel fees are awardable in an action under Section 102 where there is no finding that a suing member acted in good faith, or a finding that the union acted in good faith or without malice, is an important statutory issue, as to which lower federal courts are in conflict.

This Court has demonstrated its concern in a variety of contexts that monetary awards against unions be drawn with great caution. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53; *Vaca* v. *Sipes*, 386 U.S. 171; *Teamsters Local 20* v. *Morton*, 377 U.S. 252.

Congress, in enacting Title I did not intend to place in jeopardy the financial status of unions as institutions by having them constitute the source for fees for attorneys. Congress did not in its remotest intention contemplate that union treasuries should be equated with corporate treas-

uries as the source for fees for attorneys, such as in derivative stockholders actions. The financial and consequential adverse impact which such suits and their encouragement may have upon unions, their ability to operate as effective collective bargaining agents, and in the interests of industrial stability, as intended by Congress, is most apparent. Congress has further recognized the importance of not allowing monetary awards against unions to defeat the needs of national labor policy and the need for financially secure unions to effectuate such policy. *Linn, supra.*

In enacting Title I, Congress intended "to create limits on the exercise of union authority without vitiating a labor organization's essential strength."[13] An examination of the cases, *supra,* where courts awarded attorney's fees in Section 102 proceedings, demonstrates their holdings to be inconsistent with the foregoing Congressional policies, as well as conflicts among them, as to the standards to be applied.

The Third Circuit's majority in *Gartner, supra,* requires as a condition precedent to the exercise of the court's discretion to award attorney fees, that there be a finding that the suing member acted in good faith. Nothing further is required.

The Fifth Circuit in *Burch, supra,* and the District Court in *Sands, supra,* follow the *Gartner* requirement of the finding of plaintiff member's good faith. In addition, *Burch* and *Sands* require the additional finding that the union's conduct be either "arbitrary or discriminatory", or "malicious", as a further prerequisite for exercising discretion to award counsel fees as a proper remedy.

Robins, supra, following the *Gartner* majority, and presumably although not stating, the prerequisite to the exer-

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[13] Christensen, Union Discipline, under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 NYUL. Rev. 227, 278 (1968).

cise of discretion, that there be a finding of plaintiff's good faith, would award counsel fees if the action and remedy benefited the union and the members as a whole. It does not require as a condition of the exercise of discretion, a finding of either arbitrariness or discrimination or malice by the defendant union.

At bar, both the District Court and the Second Circuit in citing *Gartner* authority, initially appear to follow the Third Circuit's *Gartner* decision, with its requisite finding of plaintiff's good faith. However, the District Court made no such finding of plaintiff's good faith as in *Gartner*. On the contrary, it found plaintiff's conduct motivated in part by ambition for political office. And notwithstanding the findings at bar, that defendants and their officers, "in good faith, believed they had a right to so charge and discipline plaintiff for his actions", and the further finding of the absence of "a showing of (defendants) malice", nevertheless the court gave no consideration to such findings in exercising its discretion to award attorney's fees. The Second Circuit affirmed the trial court without consideration or mention of such essential findings of defendant's good faith and the absence of malice as well as no finding of plaintiff's good faith.

This Court, in *Vaca, supra*, made clear in a union member's non statutory action against his union for its failure to properly represent him (a breach of a member's right), that as to the liability of a union, before its member's monies may be the source for monetary awards, the suing member must first demonstrate his good faith and it be so found and that it be further found that the union failed to act in good faith not alone negligent, or that the union acted maliciously toward him.

The inconsistent and conflicting decisions of the courts, supra, which have awarded attorney's fees or affirmed such awards, have clearly over-stepped the foregoing *Vaca* limits. Absent resolution of such conflicts and requisite

observance of expressed national labor policy, such determinations frustrate and obstruct such policy and warrants this Court's direction for adherence to the concepts embodied in such policy.

III.

A union member's exercise of Section 101(a)(2) rights at union meetings, are subject to his observance of union adopted reasonable rules as to every member's responsibility to the union as an institution and for violation of such rules the union may charge and discipline the member.

The holding in this case, in the circumstances present, that a union member at a union meeting exercising Section 101(a)(2), free speech rights which threatened legitimate union interests as an institution, is nevertheless protected from disciplinary proceedings, raises an important issue in the construction and application of the Labor-Management Reporting and Disclosure Act, most significant in the administration of that statute.

Congress in creating Section 101(a)(2) federal rights for union members, simultaneously conditioned the extent and exercise of such rights, by the proviso contained in such Section, that such rights were subject to the union's right to adopt and enforce reasonable rules as to the responsibility of every member toward the (union) organization as an institution and to refraining from conduct that would interfere with its performance of its legal or contractual obligations. It is clear that the federal rights granted were not absolute. The rights so granted and their exercise were qualified to the extent that the member possessed no such federal right if in it's exercise he impinged upon or violated reasonable rules adopted by the union as to his and every other member's responsibility

toward the union as an institution. As such the legislation represents a classic example of a right and its exercise which must however be accommodated to a more paramount right.

The Congressional debate is devoid of any significant discussion concerning the foregoing proviso. However, a Senate Report, as found by this Court, furnishes the necessary elucidation as to Congress's general objectives which encompass the foregoing federal established rights, their qualification and accommodation.

In *Hodgson* v. *Local 6799 United Steelworkers of America, supra,* this Court at p. 338 stated:

> "• • • The introduction to the Senate report accompanying the Act summarizes the general objectives of Congress:
>
> A strong independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democractically run. In providing remedies for existing evils the Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees." S. Rep. No. 187, 86th Cong. 1st Sess., 5 (1959). U.S. Code Cong. & Admin. News, p. 2322.

The foregoing reinforces the conclusion that in administering the Act, courts must not tip the balancing which Congress intended to achieve. They must not give rigid observance to one of the many Congressional objectives, to the disregard of another Congressional objective or objectives. Of necessity there must be a balancing and accommodation of rights. Congress recognized that the overwhelming majority (unions) "are honestly and democratically run" and that the abuses were "confined to a few unions." In creating union member federal rights and remedies by reason of such abuses, Congress was careful

and so expressed its purpose, not to undermine the Congressional approved national labor policy of self government within the labor movement, nor "to weaken unions in their role as the bargaining representative of employees". And when Congress talks about "self government within the labor movement", it refers to and encompasses the internal operation of unions, who too, have their own jargon, and their own understanding of their daily problems and the concepts that their internal "laws" comprehend.[14]

Congress has placed the administration and implementation of the Act into the hands of federal courts. Charged with that responsibility, federal courts should give strict observance to the expressed Congressional purposes and enter upon the field, make the necessary balancing and accommodation of rights within the boundaries set by Congress, so that Congressional objectives and national labor policy is brought to fruition. The foregoing undertaking is not novel. Federal courts are not strangers to such tasks. They have consistently been called upon by Congress for review of conduct partaking of daily activities within the framework of national labor policy, to examine and review such activities within the aforesaid boundaries set by Congress.[15]

With respect to Section 101(a)(2) members' rights and the union institutional right expressed in the proviso and as further expressed in the aforesaid Senate report, appropriate accommodation of members' rights to such institutional right is the Congressional intent. It requires that federal courts subject to the "some evidence" test established in *International Brotherhood of Boilermakers* v.

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[14] *United Steelworkers* v. *Warrior & Gulf Navig. Co.*, 363 U.S. 574; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[15] Taft-Hartley Act, 29 U.S.C. 141 *et seq.*, Sections 10, 301 and 303; Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

Hardeman, 401 U.S. 233, in reviewing a union self government disciplinary proceeding in a Section 102 proceeding, to undertake the examination as to whether there was "some evidence" before the union trial body, that the exercise of the member's right interfered with, frustrated, conflicted with or otherwise threatened a reasonable union adopted rule to protect or preserve the union as an institution. And if there is such "some evidence", that the exercise of the member's right would bring about such result, then absent some other basis for review and decision, the discipline imposed should not be disturbed.[16] For Congress by the aforesaid proviso made clear, that Section 101(a)(2) member's right is required to be accommodated to the institution's right provided for in the proviso.[17]

The Union trial body found *inter alia*, that the plaintiff's conduct "jeopardized the jobs of 234 men on the Robin ships * * * and the job opportunities and security of all SIU men, because of the nature of employment and job security in the maritime industry", and further found " * * * SIU and MEBA have a record of mutual assistance over the past years * * * affecting the security and welfare of the membership of either one or both of the two unions" (fn. 3, *supra*). Additionally, the Trial Court found that the plaintiff had full knowledge of maritime union problems, the rivalries, jurisdictional disputes and fight for jobs. Plaintiff's conduct was knowledgeable and based upon

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[16] It is to be noted that the trial court found unnecessary, because of the result it reached, not to pass upon the alleged Section 101(a)(5) due process violation. Such issue was consequently not before the Court of Appeals or present in this petition.

[17] As this court further held in *Hardeman*, *supra*, federal courts in their review, such as at bar, should not undertake to construe the written union rule under which the member was charged, "to determine whether particular conduct falls within or without (its) scope." Id. 243. At bar plaintiff knew the conduct for which he was charged and its threat to the union. His defense was free speech protected under Section 101(a)(2).

all of the surrounding facts and circumstances, the union tribunal found that plaintiff violated his obligation of "responsibility toward the organization (union) as an institution".

The Trial Court recognized that the union tribunal's conclusion may be correct as witness its opinion that; "it may be, as the union contends, that the plaintiff's underlying union philosophy would result in a decrease in the number of union jobs available, would reduce both the union membership and the treasury" (App. C). The Court of Appeals further recognized possible basis for the union tribunal's conclusion, although first characterizing it as "speculative", then continued, "even if (it) had threatened legitimate interests of the union". Id. 779.[18]

The courts below did not make the review required by Congress and this court.[19] Both courts below found it unnecessary to undertake the performance of the "some evidence" test. Both courts concluded, that the plaintiff's exercise of his free speech Section 101(a)(2) right, at a union meeting, concerning union affairs was *per se* protected. The courts concluded that the exercise of such right negates any necessity to undertake any further review. Nothing further need be found. As such they vitiated the proviso.

The trial court interpreting Section 101(a)(2), and the Congressional intent and based upon *Salzhandler* v. *Caputo*, 316 F.2d 445 (2 Cir.) cert. den. 375 U.S. 943 and *Giordani* v. *Upholsters International Union of North America*, 403

[18] Apparently the Court of Appeals did not consider the *Hardeman* "some evidence" rule and the limited court's role in Section 102 proceedings as well as the rule prohibiting the substitution of the court's judgment for that of the union tribunal.

[19] A review of the surrounding facts and circumstance, no matter how difficult the task, in the search for "some evidence" before the union tribunal. *National Woodwork, supra, Hardeman, supra.*

F.2d 85 (2 Cir.)[20] authority, stated; "Where a member, however, presents charges in an orderly fashion at a regular union meeting, such speech falls clearly within the protected area" (App. C). Similarly the Court of Appeals held; "Moreover, even if Cole's resolution had threatened legitimate interests of the union, Congress had struck the balance of interests in favor of protecting the democratic process within unions by insuring freedom for every union member to enter into debate on union activities". Id. 779.

The courts below, by the foregoing process have failed to observe and adhere to the Congressional intent, supra. They have judicially concluded that "Congress has struck the balance of member's rights, viza union institutional rights, in favor of the former." Such interpretation, we respectfully submit does not accord with Congress's expressed intent that:

> "In providing remedies for existing evils the Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as the bargaining representative of employees." *Hodgson, supra,* at 338.

Equally significant, the aforesaid interpretation frustrates and precludes the Congressional instruction demonstrated by Section 101(a)(2)'s proviso, of accommodating a member's right to a reasonable adopted union rule of the responsibility of the member toward the union as an institution. Such error is more so compounded, when the member's conduct is knowledgeable and its adverse consequences upon the union under all of the surrounding facts and circumstances, is readily foreseeable, such as at bar.

The foregoing Court of Appeals holding in the light of the expressed Congressional intent as to the Act's purpose,

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[20] It is to be noted that the union discipline was not imposed for libel or slander, but for plaintiff's conduct constituting a threat to the union (its job opportunities), as an institution (fn. 3 *supra*).

warrants that this issue be passed upon by this Court. It is a fundamental issue which goes to the very foundation of maintaining sound union self government consistent with Congress' intent. It involves and affects a long established and substantial segment of our society—the trade union movement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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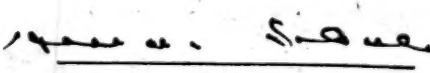
Certificate of Service

I, HOWARD SCHULMAN, Attorney for Paul Hall, et al, do hereby certify that on this 20th day of October, 1972, copies of the foregoing petition for writ of certiorari have been served on the attorney for John J. Cole,

Burton H. Hall,
401 Broadway,
New York, New York 10003

by mailing the same to him through the United States Mail, postage prepaid.



HOWARD SCHULMAN